United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-6049-50-59

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF HARTFORD, on behalf of itself and its inhabitants, Richard Brown, Nicholas R. Carbone, John Cunnane, William A. DiBella, Allyn A. Martin, Richard Suisman, Margaret V. Tedone and Olga W. Thompson in their official capacity, Miriam Jordan and Fannie Mauldin,

Plaintiffs-Appellees,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Defendants-Appellants,

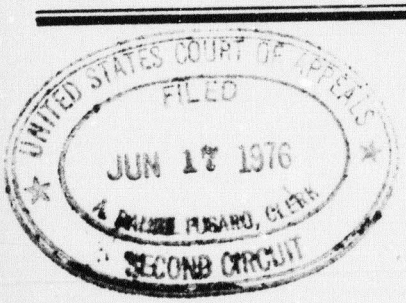
and

CARLA A. HILLS, in her capacity as Secretary of the Department of Housing and Urban Development; HAROLD G. THOMPSON, in his capacity as Acting Regional Administrator of the Department of Housing & Urban Development; LAWRENCE THOMPSON, in his capacity as District Director of the Department of Housing and Urban Development; and THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and the Towns of FARMINGTON, WINDSOR LOCKS, VERNON, and ENFIELD,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT TOWN OF EAST HARTFORD



JAMES A. WADE
ROBINSON, ROBINSON & COLE
Attorney for Defendant-Appellant
Town of East Hartford
799 Main Street
Hartford, Connecticut 06103

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BRIEF OF APPELLANT TOWN OF EAST HARTFORD

Statement of the Issues

1. The appellant, Town of East Hartford, adopts the Statement of Issues contained in the brief of the appellants, Glastonbury and West Hartford, and incorporates the same as though fully set forth herein.

2. Did the court err in concluding that the "expected to reside" figure contained in this appellant's grant application was inadequate, both in law and in fact, and therefore not a proper basis for awarding the grant?

Preliminary Statement

When the plaintiffs commenced their action against the named federal defendants none of the seven area towns were named as parties defendant. Upon motion of the federal defendants the towns of Enfield, Farmington, Windsor Locks, Vernon and the appellants—East Hartford, West Hartford and Glastonbury—were all made parties. Of all these towns only East Hartford had included a so called "expected to reside" figure in its grant application other than zero.

When the three appellants took this appeal it became apparent that there were common questions of law and fact that applied to all of them. These issues have been fully developed in the brief filed on behalf of the Towns of West Hartford and Glastonbury. They apply with equal validity to this appellant. In the interest of not repeating all of the claims contained therein, this appellant adopts as its own the factual statement and the legal arguments contained in that brief.

In addition, because of the inclusion of an "expected to reside" figure in its grant application by the Town of East Hartford, a unique issue arose in the case dealing with that figure. The district court devoted a substantial portion of its memorandum of decision to this problem. Therefore, this brief will be addressed to the claim by the Town of East Hartford that the district court improperly rejected that figure.

The District Court Erred in Concluding That the Secretary of the Department of Housing and Urban Development Abused Her Discretion in Approving the Grant Application of the Town of East Hartford

The application of the Town of East Hartford, Connecticut for its community development grant was unique among the seven defendant towns in this case, in that it had included therein a figure[1] other than zero for the "expected to reside" portion of its housing assistance plan. The figure was derived from a projection of the waiting list for the East Hartford Housing Authority.[2] The East Hartford application was submitted and approved in a timely fashion before the dilemma of developing an "expected to reside" figure was posed by the other grant applicants.

Notwithstanding its compliance with the statutory requirements of the law[3] the district court held that the Secretary abused her discretion in approving East Hartford's grant application because her decision was not based

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[1] The original H.A.P. called for 135 assisted units of housing which included 81 for the elderly or handicapped, 16 for large families and 38 others. The H.A.P. was reviewed by HUD and revised downward to a total of 131 units which included 78 for the elderly, 15 for large families and 38 for others.

[2] See Attachments D and K to the Administrative Record for East Hartford.

[3] 42 U.S.C. § 5304(a)(4).

on a consideration of the relevant factors that were "generally available" and therefore amounted to "arbitrary and capricious decision making" (Memorandum of Decision, p. 32). The Court goes on to find that this appellant's statutory compliance was "simply happenstance" (*Id.* at 34), that its "expected to reside" figures were "untested and untestable" (*Id.* at 35) and that the Secretary could have challenged these figures had she acted diligently. (*Id.* at 35).

Interestingly enough, the Court specifically found that East Hartford did not "invent" its figure or that HUD's review thereof was entirely passive. (*Id.* at 37). Indeed throughout the entire transcript and in all of the supporting data, there is no attack upon the figure itself. The entire claim and the Court's decision is based on the process rather than on the merits of East Hartford's application. It is respectfully submitted that the district Court's holding is without legal basis, constitutes an unwarranted arrogation of the administrative function unto itself, and is an elevation of form over substance that penalizes this community and its citizens notwithstanding its good faith effort to comply with the mandate of the law.

A. The Presumption of Regularity on the Part of an Administrator.

It is a basic tenet of administrative law that the acts of an administrator, functioning in his official capacity, are presumed to be proper and regular absent clear proof to the contrary. In *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15 (1926), the Court held:

> The presumption of regularity supports the official acts of public officers[4] and in the absence of clear evi-

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[4] The presumption extends to both administrative as well as legislative officers. *Pacific States Co.* v. *White,* 296 U.S. 176, 185 (1935).

> dence to the contrary, Courts presume that they have properly discharged their duties.

This rule of regularity was adopted verbatim in this Circuit in *Williams* v. *Trans World Airlines,* 509 F. 2d 942, 948, f.n. 11 (2d Cir. 1975), wherein the Court upheld the action of an airline that refused passage to a regularly ticketed customer solely on the word of the F.B.I. without an independent investigation of its own. Similarly in *Alfred A. Knopf, Inc.* v. *Colby,* 509 F. 2d 1362, 1368 (4th Cir. 1975); cert. den. 95 S. Ct. 1555 (1975); cert. den. 95 S. Ct. 1999 (1975), the Court held that the classification of documents as top secret by the C.I.A. must be deemed to be proper due to the presumption of regularity in the absence of affirmative proof to the contrary. See also *Reed* v. *Franke,* 297 F. 2d 17, 25 (4th Cir. 1961).

The lack of affirmative evidence to rebut the presumption was the single element on which the Court refused to enjoin an F.T.C. investigation into a joint venture among four oil companies in *Atlantic Richfield Co.* v. *F.T.C.,* 398 F. Supp. 1, 15 (S.D. Tex. Houston Div. 1975). See also *Seneca Grape Juice Corp.* v. *United States,* 367 F. Supp. 1396, 1404 (Cust. Ct. 1973). The obvious reason for establishing the presumption and placing a heavy burden of proof on the party attacking it is to preserve the integrity of the two branches of government and to avoid clogging the Courts with endless administrative appeals by disappointed parties. This respect for the independence of the administrative and judicial functions was perhaps best summed up by the Supreme Court in *United States* v. *Morgan,* 313 U.S. 409, 422 (1941), wherein a review of the action of the Secretary of Agriculture establishing rates pursuant to the Packers and Stockyards Act was rejected.

> . . . although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are deemed to be col-

> laborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

It is submitted that in the instant case, the district court viewed the action of the Secretary in approving the grant application with a skepticism unwarranted by the record before it. As a result it ignored the bona fides of both the applicant town and the administrative agency as well as the clear language of the statute which mandates approval of grant applications unless the needs and objectives described therein are plainly inconsistent with the facts.

B. The Statute Affirmatively Mandates Approval of Community Development Grants.

It seems clear that the Congressional intent in enacting the Housing and Community Development Act of 1974 was to launch an immediate attack upon the problems[5] facing America's cities and towns with a minimum of bureaucratic red tape. To this end the Act provides that any grant application *shall* be deemed to be automatically approved within 75 days after receipt by the Secretary of the Department of Housing and Urban Development unless the Secretary informs the applicant of the specific reasons for disapproval.[6] Indeed the Act affirmatively *requires* the Secretary to approve a grant application unless:

> (1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicants' description of such needs and objectives is plainly inconsistent with such facts or data; or

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[5] The Act's Findings and Declaration of Purpose finds "critical social, economic and environmental problems" in the Nation's cities, towns and smaller urban communities (42 U.S.C. § 5301(c)).

[6] 42 U.S.C. § 5304(f).

(2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant pursuant to subsection (a) of this section; or

(3) the Secretary determines that the application does not comply with the requirements of this chapter or other applicable law or proposes activities which are ineligible under this chapter.[7]

Therefore it appears that the presumption is that local officials have acted responsibly in submitting their grant applications and that if a disapproval of same is forthcoming the burden is on the Secretary to justify the same. This would appear to be consistent with Congressional intent to launch the redevelopment of our cities and towns at once and to stimulate local solutions to local problems with a minimum of Federal interference.

Ironically, in the present case the district court seems to take the opposite approach. It presumes East Hartford's "expected to reside" figure to be inappropriate (notwithstanding the total absence of proof to that effect) and criticizes the Secretary and her staff for failing to engage in a prolonged investigation attacking the figure and wrapping the grant application in bureaucratic red tape. Such an approach is plainly unsupported by the law and does not measure up to commonly accepted standards for judicial review of administrative decisions.

C. The Standard for Judicial Review of Administrative Decisions.

In its memorandum of decision, the district court misconstrues the language of the Administrative Procedure

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[7] 42 U.S.C. § 5304(c).

Act by claiming that the statute[8] "requires one to determine", in essence, "whether the decision [to approve East Hartford's grant] was based on a consideration of the relevant factors and whether there has been a clear error of judgment". (Memorandum of Decision, pp. 31-32). This allegiance to the statutory language is misplaced in view of the rule in this circuit outlining the duties of courts reviewing administrative decisions.

In *Wong Wing Hang* v. *Immigration and Naturalization Service,* 360 F. 2d 715, 718-719 (2d Cir. 1966), the court conducted a review of the applicable standards utilized by courts reviewing administrative decisions. It noted that the Supreme Court had affirmed agency decisions when it was not shown that there was not "an abuse of discretion and the reasons on which they were based were neither capricious nor arbitrary", citing *United States ex rel. Hintopoulos* v. *Shaughnessy,* 353 U.S. 72, 77 (1957) and *Foti* v. *Immigration and Naturalization Service,* 375 U.S. 217, 228, 229 (1963). What troubled the court was what this language meant.

On the one hand was the so called "clear error of judgment" standard enunciated in *In re Josephson,* 218 F. 2d 174, 182 (1st Cir. 1954), while a more limited notion was spelled out in *Delno* v. *Market Street Ry. Co.,* 124 F. 2d 965, 967 (9th Cir. 1942), which held that discretion is abused only when the action "is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view under discussion." This Court took a middle approach in

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[8] 5 U.S.C. § 706 provides in pertinent part:

"The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Wong Wing Hang in establishing the rule for this Circuit:

> Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or in Judge Learned Hands' words, in other "considerations that Congress could not have intended to make relevant." *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (2d Cir. 1950).

The Supreme Court attempted to set a standard for judicial review in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971), but may have confused the issue further. In interpreting 5 U.S.C. § 706, the Court said it must "consider whether the decision [of the administrative agency] was based on a consideration of the relevant factors and whether there has been a clear error of judgment" citing both *Josephson, supra* and *Wong Wing Hang, supra.* It goes on to say "although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* at 416.

Since *Overton Park,* lower courts have been struggling with the proper standard to follow. Thus, for example, in *Raitport* v. *National Bureau of Standards,* 385 F. Supp. 1221, 1225 (E.D. Pa. 1974), the court recognized both the "clear error" standard of *Josephson* and the "rational explanation" standard of *Wong Wing Hang,* noted that *Overton Park* relied on both, and said that it could uphold the agency on either standard. Meanwhile in *DiMaren* v. *Immigration and Naturalization Service,* 398 F. Supp. 556, 560 (S.D.N.Y. 1974), the court clings to the "rational explanation" standard without even a glance at *Josephson* or *Overton Park.*

This court appears to continue to adhere to the "rational explanation" standard in *Noel* v. *Chapman*, 508 F. 2d 1023, 1028-29 (2d Cir. 1975), wherein it found a "rational relationship" between the policy of the Immigration and Naturalization Service barring the entrance of certain aliens and the avowed purpose of Congress to protect the American Economy, citing *Wong Wing Hang*. Based upon this review of the law relating to judicial review of administrative decisions, this appellant claims that the district court applied an improper standard in holding that the Secretary abused her discretion in granting approval of East Hartford's application "without taking the steps required to obtain the 'generally available' information needed to evaluate these applications" (Memorandum of Decision, p. 32). In view of the affirmative tilt of the Act in favor of the applicant, the Court chose to impose a level of administrative review that the Congress did not intend. In doing so, the court rejected the notion that all that was required of the Secretary was a "rational explanation" of the figures submitted and instead held that a critical analysis of the "expected to reside" figure was required. In doing so the Court rejected the good faith efforts of the applicant, East Hartford, but has, in effect, punished the town and its inhabitants on the basis of an ad hoc requirement to justify its figure to a degree not envisioned by the Act.

D. East Hartford's Application Constitutes Good Faith Compliance With the Statute and Has Not Been Proven to Be Substantively Wanting.

Of the seven defendant towns in this action only East Hartford made a good faith effort to meet all of the requirements of the law by including an "expected to reside" figure in its application. Yet the district court finds that this statutory compliance was "simply happenstance" (Memorandum of Decision, p. 34) because the town filed its application in a timely fashion before the so called

Meeker memorandum was issued suspending the requirement of an "expected to reside" figure for the first year. The Court in effect derides the good faith and timeliness of East Hartford and then criticizes the figure as being "untested and untestable" (Memorandum of Decision, p. 35).

It is this concern with the method of obtaining and checking East Hartford's "expected to reside" figure that reveals the defect in the court's opinion. In order to substitute its judgment for that of the Secretary, the court should focus its attention on the substance of East Hartford's figure, not on how it was obtained. The basic question, as yet unanswered anywhere in this case is, does East Hartford's figure bear a rational relationship to the number of lower income families expected to reside in that community. The answer to that question can be found only in adequate proof relating to the merits of the figure. The District Court neither demanded nor received such evidence. It simply concerned itself with the method of deriving the figure. Therefore it was error for the court to conclude that the Secretary abused her discretion in accepting the figure.

The plaintiffs offered evidence relating to their attack on the grant applications of the seven towns through a professional city planner, Mr. Jonathan Colman, the Director of Planning for the City of Hartford and the Director-Secretary for the Planning Commission for the City of Hartford (T.T. 49). With regard to East Hartford's application Mr. Colman testified about the town's total population and its racial make up (T.T. 57). At the urging of the court (T.T. 60) Mr. Colman limited his testimony to the material that was available to HUD relating to East Hartford's application at the time it was made. Significantly, counsel for HUD specifically acknowledged to the court that HUD had a variety of data

available to it but did not consider the same as significant in deciding the number of people that are expected to reside in a community (T.T. 61), a point which the court acknowledged to be where the issue falls (T.T. 63).

Mr. Colman went on to testify that data relating to the economic situation was available through the U.S. Census Bureau and the Regional Planning Commission (T.T. 68). He pointed out that the median family income in East Hartford was $10,500 and that the median sales prices for housing from November 1973 to November 1974 was $40,000 (T.T. 69). He further testified that 4600 Hartford residents work in the Town of East Hartford (T.T. 70) although he offered no evidence as to what kind of incomes these people earned.[9] All of this information was interesting, but standing alone it bore no relationship to the "expected to reside" figure submitted by East Hartford. Indeed, in his only testimony about the figure, Mr. Colman's criticism was as to the method of deriving the figure, and did not specifically challenge the figure itself:

> We noted that they developed their need estimate for those requiring estimates on a waiting list of households who might be using their public housing. We believe that is a very narrow perspective to utilize in terms of those who might need assistance. (T.T. 72).
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> * * *
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> In terms of the persons expected to reside, they again would look only to a waiting list or applicant proof of non-residents for their public housing and did not base, as the regulations require, that expected

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[9] It should be pointed out that the main manufacturing plant for United Technologies (formerly United Aircraft) is located in East Hartford. United Technologies is the largest private employer in the State of Connecticut and draws significant numbers of employees from as far away as Massachusetts.

to reside projections include those who are working and have jobs in the community. (T.T. 73).

Maybe Mr. Colman would have selected an "expected to reside" figure in a different way, but he offered no testimony as to what the figure should be, other than that submitted by East Hartford. The thrust of the district court's criticism is that there was an abundance of information that the Secretary could have utilized to test East Hartford's figure which she did not do. (Memorandum of Decision, pp. 35-36). Yet the court did not require the plaintiffs, who came to court attacking the figure, to produce any evidence of its illegitimacy. In view of the presumption of regularity attaching not only to the Secretary's approval but to the application itself by the administrators of East Hartford, where is the "clear evidence to the contrary" *United States* v. *Chemical Foundation, supra,* which is required to rebut the presumption?

On cross examination, Mr. Colman's lack of knowledge about the housing requirements of East Hartford became apparent. He had no knowledge of the number of new apartments constructed in the last eight years (T.T. pp. 155, 158); did not know where the Hartford people worked in East Hartford (T.T. 156) and did not know where they came from or how many were minorities (T.T. 157). He had no knowledge of where drainage problems existed in East Hartford (T.T. 159) but acknowledged that solving drainage problems would affect a town's ability to build moderate income housing (T.T. 160). He acknowledged that the minorities living in East Hartford were not clustered in a single area but were living all over town (T.T. 163).

Although Mr. Colman at first claimed that the so called "journey to work" statistics that he found to be significant was "published" by the Connecticut Department of Labor, he later acknowledged that such figures were not in fact

published but could be obtained only from a computer printout (T.T. 177).[10]

This appellant can only conclude that in reaching its decision that the Secretary abused her discretion in approving East Hartford's grant application the court was more concerned with how the "expected to reside" figure was obtained not what it was—a triumph of form over substance. Although acknowledging that East Hartford did not "invent" its figure (Memorandum of Decision, p. 37), the court is quick to find that the Housing Authority "waiting list was clearly insufficient as a data base" (Memorandum of Decision, p. 38). The court reaches this conclusion without requiring of the plaintiffs, or indeed of itself, the standard of proof that it imposes on the Secretary in approving or disapproving the grant application in the first place. Such an approach is clearly erroneous.

Conclusion

In addition to the bases in law set forth in the brief of the Towns of Glastonbury and West Hartford for reversing the district court, which this appellant adopts as its own, it is submitted that the claim of East Hartford must be viewed separately in view of its compliance in fact with the "expected to reside" requirement of the statute. In view of the presumption of regularity on the part of both the Secretary and the officials of the town and the absence of any proof attacking the figure itself, it is respectfully submitted that the district court erred in holding that the

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[10] Interestingly enough, the court attached significance to the fact that these journey to work statistics "lacking only income figures" were obtained on two days notice. It is submitted that without income figures the statistics are meaningless insofar as obtaining the number of lower income families "expected to reside" in East Hartford, especially since the majority of those making the journey are going to work at the largest private employer in the State.

Secretary abused her discretion in approving the application of East Hartford.

Therefore it is respectfully submitted that the judgment of the district court enjoining East Hartford from drawing upon the Treasury of the United States or spending in any fashion the entitlement funds granted to them pursuant to Title I of the Housing and Community Development Act of 1974 should be set aside and judgment should enter in favor of this appellant.

Appellant, Town of East
Hartford, Connecticut

By JAMES A. WADE
James A. Wade
Robinson, Robinson & Cole
799 Main Street
Hartford, Connecticut 06103
Its Attorney

UNITED STATES COURT OF APPEALS
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CITY OF HARTFORD, ET AL.,

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and

CARLA A. HILLS, ET AL.,

Defendants.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 17th day of June, 1976, he served two copies of the Brief of Appellant Town of East Hartford on See attached list

the attorneys for ~~the~~ see attached list by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. See attached list ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this

17th day of June, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 17TH day of JUNE 1976

Patricia Cooper FOR RICHARD A. BALLMAN

OF COUNSEL TO Attorney GEN FOR PLAINTIFFS APPELLEES